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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

LYNDA A. ALI, Petitioner/Appellee, v. ALEJANDRO M. BADILLA, Respondent/Appellant.	2 CA-CV 2010-0159 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. D20002309

Honorable Frederic J. Dardis, Judge Pro Tempore

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Jamie R. Heller
Phoenix
Attorneys for Petitioner/Appellee
Department of Economic Security

Alejandro Badilla
Miami, Florida
In Propria Persona

K E L L Y, Judge.

¶1 Alejandro Badilla appeals from the trial court's order modifying his child support obligation. He alleges the court abused its discretion in determining his monthly income was $6,000 and in including costs of parochial school in its calculation of child support. He also argues the court erred in admitting the testimony of an "undisclosed" witness. Alejandro's former wife, Lynda Ali, has not filed an answering brief, which we may, but are not required to, regard as a confession of error as to any debatable issue. *See* Ariz. R. Civ. App. P. 15(c); *In re Marriage of Diezsi*, 201 Ariz. 524, ¶ 2, 38 P.3d 1189, 1190 (App. 2002). Nevertheless, because we find no error or abuse of discretion, we affirm.

Background

¶2 "We view the record in the light most favorable to upholding the trial court's decision." *Duwyenie v. Moran*, 220 Ariz. 501, ¶ 2, 207 P.3d 754, 755 (App. 2009). Alejandro and Lynda were married in 1984. In 2000, Lynda filed a petition for divorce, alleging Alejandro had abandoned the marriage in 1994 and relocated to Florida. Alejandro failed to respond to the petition and the court issued a divorce decree in his absence. The decree awarded Lynda sole legal and physical custody of the couple's three minor children.

¶3 In 2001, the trial court ordered Alejandro to appear and show cause why he should not be required to pay child support and arrearages. The court found Alejandro had a monthly income of $6,000 and ordered him to pay $1,392 per month in child support as well as arrearages and interest from the date the divorce decree was entered.

In 2006, the court terminated the child support order with regard to the couple's oldest child, who had reached the age of majority. The court further modified Alejandro's child support obligation to include the cost of private school for the two remaining minor children. And, after finding that Alejandro had remarried, had adopted his new wife's child, and had two children from the new marriage, the court issued a final support award of $1,148.[1]

¶4 Alejandro filed a motion to reconsider challenging, inter alia, the inclusion of private school tuition in the child support order and the court's findings regarding his income for January 2005 to April 2006. The trial court granted the motion only to the extent it found Alejandro's responsibility should be based on the "cost after . . . scholarship[s] or other credit . . .[, but i]f there is no scholarship or other credit, the Ruling remain[ed] unmodified." Further, because the court had been mistaken in finding Alejandro had two natural children from his second marriage, it "revised [its] findings and calculations of support." Alejandro was subsequently ordered to pay $1,171 per month in child support.

¶5 In 2009, Alejandro filed a pro se motion to modify child support, alleging he had sustained a substantial reduction in his gross monthly income. In January 2010, at the request of the state, the petition was dismissed for failure to prosecute.[2] The same

[1]In fact, there was only one natural child from the new marriage.

[2]Pursuant to A.R.S. § 25-509, the state filed an entry of appearance for the limited purpose of being heard on the issues of child support and reimbursement.

month, Lynda filed a request that Alejandro be found in contempt of court for failing to pay child support. Following a hearing, in February 2010 the trial court found Alejandro had "failed to make his child support payments[, and] there exist[ed] substantial arrears" and set a modification hearing the following month, to determine Alejandro's income.[3]

¶6 At that time, the only one of the couple's children who remained a minor was G., born in 1994. At the March hearing, the court was unable to determine Alejandro's gross monthly income, and it reset the hearing. Both Alejandro and Lynda were unrepresented during the proceedings, and attorney Edward Wong appeared for the state.[4] Although the court noted Alejandro had been subjected to numerous lawsuits, foreclosures, and repossessions, it found he was employed and accepted Lynda's estimation that his monthly income was "[w]ell over $6,000." The court further ordered the cost of G.'s private school be included in the child support computation. The court thereafter ordered Alejandro to pay $1,169 each month in child support. This appeal followed.

[3]Alejandro appears to believe the trial court's ruling was based on his petition for modification, arguing "a better course would be to deny his petition for downward modification and set a review date to check on his progress in obtaining gainful employment, not to set a punitive imputed income." As noted above, however, his petition was dismissed and the proceedings were a result of Lynda's enforcement action.

[4]The state filed a notice of nonparticipation in this appeal.

Discussion

I. Child Support Modification

a. Judicial Bias

¶7 Alejandro argues the trial court was biased against him. We begin by pointing out that the issue of bias may not be raised for the first time on appeal. *State v. Everhart*, 169 Ariz. 404, 408, 819 P.2d 990, 994 (App. 1991); *see also Conant v. Whitney*, 190 Ariz. 290, 293-94, 947 P.2d 864, 867-68 (App. 1997). He bases his claim of bias solely on statements made by the court that he interpreted as "antagonistic towards [him]." Yet, he did not timely file an affidavit asserting bias pursuant to A.R.S. § 12-409(B)(5), nor did he raise the issue of bias in a request for new trial pursuant to Rule 83, Ariz. R. Fam. Law P. Because he failed to raise the issue below, the argument is waived. *See State v. Schackart*, 190 Ariz. 238, 256, 947 P.2d 315, 333 (1997) (in death penalty case bias claim based on "comments allegedly showing the court's irritation with defendant, should have been raised at that time and [were] therefore . . . waived"). In any case, we disagree that the court's comments show any bias. *See State v. Rossi*, 154 Ariz. 245, 247, 741 P.2d 1223, 1225 (1987) (party challenging court's impartiality must overcome presumption trial judge is "free of bias and prejudice"); *see also Simon v. Maricopa Med. Ctr.*, 225 Ariz. 55, ¶ 29, 234 P.3d 623, 631 (App. 2010) ("The bias and prejudice necessary for disqualification generally 'must arise from an extra-judicial source and not from what the judge has done in his participation in the case.'"), *quoting*

State v. Emanuel, 159 Ariz. 464, 469, 768 P.2d 196, 201 (App. 1989) (quotation omitted in *Simon*).

b. Sufficiency of the Evidence

¶8 Alejandro contends he "lack[s] . . . any significant current income" and "[t]here was no evidence to support" the court's finding that his income is $6,000 per month. We review an award of child support for an abuse of discretion. *Little v. Little*, 193 Ariz. 518, ¶ 5, 975 P.2d 108, 110 (1999). A court abuses its discretion only when the record is "devoid of competent evidence to support [its] decision." *Platt v. Platt*, 17 Ariz. App. 458, 459, 498 P.2d 532, 533 (1972). We do not reweigh the evidence, but consider only whether there is reasonable evidence supporting the trial court's decision. *See Rowe v. Rowe*, 154 Ariz. 616, 620, 744 P.2d 717, 721 (App. 1987).

¶9 Alejandro relies primarily on his own testimony to support his challenge to the sufficiency of the evidence. The trial court "is in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and resolve disputed facts." *Ariz. Dep't Econ. Sec. v. Oscar O.*, 209 Ariz. 332, ¶ 4, 100 P.3d 943, 945 (App. 2004). Accordingly, we defer to the trial court's findings of fact. Here, the court found Alejandro's testimony "not credible."[5] Although he denies receiving any income beyond

[5]Alejandro maintains "[t]he Court should not set an income . . . simply based on a credibility determination." But he provides no authority to support this contention. *See* Ariz. R. Civ. App. P. 13(a)(6) (appellant's brief "shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on"); *FIA Card Servs., N.A. v. Levy*, 219 Ariz. 523, n.1, 200 P.3d 1020, 1021 n.1 (App. 2008) (failure to develop an argument

unemployment payments, the evidence presented could reasonably be interpreted as showing Alejandro was in fact receiving income through his wife's business and potentially through businesses run by her family.

c. Section 25-320(N), A.R.S.

¶10 Alejandro also asserts that the trial court's ruling was contrary to law because A.R.S. § 25-320(N) provides "[t]he court shall presume, in the absence of contrary testimony, that a parent is capable of full-time employment at least at the applicable state or federal adult minimum wage, whichever is higher." He argues that because he was receiving unemployment payments and was subject to "numerous law suits," "foreclosures," and "repossessions," there was "overwhelming" evidence showing he had no "significant current income." Therefore, he contends, "[t]here [wa]s no competent evidence to overcome the presumptive imputed income provided for by [the] statute." Alejandro's interpretation of § 25-320(N) is incorrect.

¶11 Section 25-320(N) sets a minimum presumed income, not a maximum. The statute provides the court shall presume a parent can find "full-time employment *at least at* the . . . minimum wage." § 25-320(N) (emphasis added); *see also State ex rel. Dep't Econ. Sec. v. McEvoy*, 191 Ariz. 350, ¶ 13, 955 P.2d 988, 991 (App. 1998) ("statute creates a presumption that can be rebutted by evidence showing that a minimum wage capacity cannot be achieved"). The use of the words "at least at" placed the burden on

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on appeal constitutes abandonment). Furthermore, as discussed above this position is contrary to law.

Alejandro to show he was unable to find at least minimum wage employment and not, as he argues, on Lynda to prove that he was capable of earning more. *See id.* In a child support dispute, a trial court is permitted to impute an income up to a parent's "full earning capacity." *Little*, 193 Ariz. 518, ¶ 6, 975 P.2d at 111.

¶12 Furthermore, it is not improper for a court to base a child support order on a parent's past income rather than his actual income. *See, e.g., id.* (affirming child support order based on parent's income prior to becoming full-time student). A court may consider if a parent is "unemployed or working below full earning capacity" when determining the amount of child support the parent should pay. § 25-320 app. § 5(E). In its 2001 child support determination, the trial court found Alejandro's monthly income was $6,000 per month. Therefore, we cannot say the court abused its discretion in the current action by imputing that amount of monthly income to Alejandro. *See Platt*, 17 Ariz. App. at 459, 498 P.2d at 533.

II. Parochial School Tuition

¶13 Alejandro next argues that G.'s need to attend private school was not supported by "the facts or the [Arizona Child Support G]uidelines," and therefore the court improperly included it in its determination of child support. The Guidelines are not substantive law but guide courts in applying the law. *Little*, 193 Ariz. 518, ¶ 6, 975 P.2d at 111. However, the trial court must consider the Guidelines when modifying child support pursuant to A.R.S. §§ 25-320(A) and 25-327(A). *See* § 25-320(D); *see also* § 25-320 app. § 3 ("In any action . . . to modify child support, . . . the amount resulting from

application of these guidelines shall be the amount of child support ordered."). We review a trial court's interpretation of the Guidelines de novo. *Jordan v. Rea*, 221 Ariz. 581, ¶ 27, 212 P.3d 919, 929 (App. 2009).

¶14 The Guidelines provide that the court "[m]ay add to the Basic Child Support Obligation amounts . . . [a]ny reasonable and necessary expenses for attending private . . . schools . . . when such expenses are incurred by agreement of both parents or ordered by the court." § 25-320 app. § 9(B)(2). Alejandro argues he never agreed to send G. to private school and the court erred in concluding that private schooling was reasonable and necessary, in light of the parents' financial condition.

¶15 The inclusion of private school costs in Alejandro's child support obligation first occurred in the 2006 modification order.[6] There, the trial court found "the parties previously agreed to the private school expense, though [Alejandro] may not have known the precise cost." Although Alejandro asked the court to reconsider the award of private school tuition in 2006, we are unable to locate, and Alejandro has not directed us to, any point in the record where he objected to G. attending private school in the present proceedings. *See* Ariz. R. Civ. App. P. 13(a)(6). Therefore, the issue is waived on appeal. *Trantor v. Fredrikson*, 179 Ariz. 299, 300, 878 P.2d 657, 658 (1994) ("errors not raised in the trial court cannot be raised on appeal").

[6]It appears that private schooling was not included in the court's initial 2001 support order, despite Alejandro's apparent assertion otherwise.

III. Witness Testimony

¶16 Alejandro also argues "[t]he Court erred in allowing . . . Carlos Franco to testify," because he "was not given adequate notice and an opportunity to prepare for this testimony." He asserts both here and below that Franco was a surprise witness, and therefore the court's admission of his testimony was error. Alternatively, Alejandro argues for the first time on appeal that the trial court should have granted him a continuance to prepare for Franco's testimony. We review a trial court's decision whether to allow a witness to testify for an abuse of discretion. *See Waddell v. Titan Ins. Co.*, 207 Ariz. 529, ¶¶ 27-28, 88 P.3d 1141, 1148 (App. 2004). As noted above, we generally will not consider issues that were not presented first to the trial court. *Trantor*, 179 Ariz. at 300, 878 P.2d at 658. Alejandro's argument lacks merit in any event.

¶17 When Alejandro objected to Franco's testimony, the trial court informed Alejandro that Lynda had included a witness list in the "cover letter . . . that she submitted to the Court." Although Alejandro denied having the document, it is clear from the record that Lynda had provided a witness list and that it had included Franco. The witness list appeared in documents filed in the trial court on June 4. Although this was the same day as the hearing, Lynda testified she had mailed the same documents to Alejandro and although Alejandro admitted he had received the documents, he claimed he did not have the cover letter. In denying his motion to preclude the witness, the court implicitly rejected this argument, finding Alejandro had notice. We agree that Alejandro

had notice that Franco would be called as a witness. Therefore, we conclude there was no unfair surprise and likewise no error in the admission of this witness's testimony.[7]

Disposition

¶18 The trial court's order is affirmed.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

[7]To the extent Alejandro argues that Franco's testimony was false, we again note that the trial court "is in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and resolve disputed facts." *Oscar O.*, 209 Ariz. 332, ¶ 4, 100 P.3d at 945. Here, the court "did not find any motive for [Lynda]'s witness to lie" and that "[Alejandro] substantiat[ed] a major portion of the [witness's] testimony." Alejandro makes no argument that these findings were in error. We, therefore, do not consider the issue. *See FIA Card Servs.*, 219 Ariz. 523, n.1, 200 P.3d at 1021 n.1.